IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

The decision of the United States District Court for the Eastern District of New York, Chief Judge Jacob Mishler presiding, declaring Section 186 of New York's Election Law unconstitutional has not yet been officially reported. It is reproduced in the Appendix at 21-47. The Memorandum of Decision and Order of Chief Judge Mishler denying respondents' application for reargument has not yet been officially reported. It is reproduced in the Appendix at 49-56. The decision of the United States Court of Appeals for the Second Circuit reversing the District Court has not yet been officially reported. It is reproduced in the Appendix at 64-73.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on Friday, April 7, 1972. A motion for a rehearing in banc was made on Monday, April 10, 1972 and was denied on April 24, 1972. The petition for certiorari herein was docketed on April 24, 1972. Certiorari was granted on May 30, 1972. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Is Section 186 of New York's Election Law unconstitutional insofar as it prohibits persons enrolling in a political party from participating in a primary election unless their enrollments were completed 30 days prior to the last preceding general election?

2. Do less drastic alternatives exist to the disenfranchisement of voters situated similarly to petitioners?

3. Does Section 186, by deferring the effective date of petitioners' affiliation with the Democratic Party for at least eleven months, impose an unconstitutional restraint upon petitioners' freedom of association?

4. Does Section 186 impose an unconstitutional durational residence requirement for voting in a New York primary election?

5. Does Section 186 constitute an unconstitutional "grandfather clause" conditioning full participation in the current electoral process upon some degree of participation in a preceding election?

Statutory Provisions Involved

NEW YORK STATE ELECTION LAW, §186

§186. *Opening of enrollment box and completion of enrollment*

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register con-

taining enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year. L.1949, c. 100; amended L.1955, c.41, eff. March 7, 1955.

The Operation of New York's Statutory Scheme Regulating Affiliation With a Political Party

Registered voters in New York State desiring to associate with one of the four political parties currently recognized under New York law must cope with a cumbersome and archaic party enrollment process dating from the 19th century. Each prospective enrollee must complete an enrollment blank containing the following declaration:

"I, ..., do solemnly declare that I am a qualified voter of the election district in which I have been registered and that my resident address is .....; that I am in general sympathy with the principles of the party which I have designated by my mark hereunder; and that it is my intention to support generally at the next general election, state or national, the nominees of such party for state or national offices." Election Law, §174. See also §§369; 385-389.

Once the enrollment blank has been completed, it must be deposited in an enrollment box in such a manner as to conceal the identity of the party involved. *Election Law* §173. The enrollment box into which the enrollment blank is deposited must remain locked until the Tuesday following the next general election. *Election Law* §186.[1] No action finalizing an enrollment can occur while the enrollment blank is locked in the enrollment box. Once the enrollment boxes have enjoyed their annual mid-November airing, the respective party affiliations set forth on the enrollment blanks are entered on the official election registers "before the succeeding first day of February." *Election Law* §186. Until the boxes have been opened and the party affiliation formally entered on the register books, the voter involved is not deemed to be enrolled in the party of his or her choice. *Election Law* §186.

Applying New York's statutory scheme to petitioners' attempt to associate with the Democratic Party, the following events must occur before they will be recognized by New York State as affiliated with the political party of their choice.

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[1] In 1972, the date for the annual opening of the enrollment boxes falls on November 14, 1972.

1) They must duly register to vote.

2) They must complete an enrollment blank at which they "solemnly declare" their general sympathy with the party with which each wishes to associate. *Election Law* §§174; 369; 385-389.

3) They must deposit the completed enrollment blank in a locked enrollment box. *Election Law* §173.

4) The completed enrollment blank must remain locked in the enrollment box until November 14, 1972. *Election Law* §186.

5) Sometime between November 14, 1972 and February 1, 1973, petitioners' names must be entered on the official register books as enrolled Democrats. *Election Law* §186.

6) Until the register book entry is made, petitioners may not vote in a primary election or participate, in any way, in the affairs of the Democratic Party. *Election Law* §186.[3]

Thus, despite the fact that each petitioner formally expressed his or her intention to associate with the Democratic Party in early December 1971, and "solemnly declared" his or her general sympathy with the principles of the Democratic Party, they will not be permitted to associate with the Democratic Party until a date somewhere between November 14, 1972 and February 1, 1973,

[3] Thus, the period which must elapse under New York law between petitioners' initial attempt to join the Democratic Party and their official acceptance as party members is 11-14 months.

Section 187 of the Election Law permits a limited number of voters to enroll immediately in the party of their choice without waiting for the annual opening of the enrollment boxes. The chief exceptions contained in Section 187 are for persons who were too young or too ill to have registered previously.

and, therefore, were barred from voting in the June 1972 Presidential Primary.

New York's deferred enrollment procedure also disenfranchises persons seeking to re-register after having established a new residence in New York.

Thus, an established member of a political party who moves from Brooklyn to Nassau County may not participate in the affairs of his party or vote in a primary until his new enrollment blank has been taken from the locked enrollment boxes and re-entered on the voting registers pursuant to Section 186.

In addition, an established member of a political party who moves from a sister state into New York State may not participate in the affairs of his party until his new enrollment blank has been removed from the locked enrollment box and processed pursuant to Section 186.

Accordingly, no person who established a residence in New York State subsequent to October 2, 1971[3] was eligible to vote in the June 1972 Presidential primary. Cf., *Dunn* v. *Blumstein*, —— U.S. ——, 31 L. Ed.2d 274 (1972).

The issue posed by this case is whether New York may impose such a drastic curb on the right to vote, the right to travel and the right to associate for the advancement of political beliefs.

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[3] October 2, 1971 was the last date on which enrollment blanks could have been completed in time for the annual November 1971 enrollment box opening. Enrollment blanks received after October 2, 1971, will not see the light of day until November 14, 1972.

— Statement of the Case

Petitioners are duly qualified voters who were barred from voting in New York's June 20, 1972, Presidential primary because they failed to enroll in the Democratic Party on or before October 2, 1971.

Petitioners registered to vote for the first time in New York State early in December 1971 and immediately sought to enroll in the political party of their choice.[4] Each petitioner duly completed an enrollment blank designating his or her respective affiliation with the Democratic Party and affirming his or her intention to support the candidates of the Democratic Party at the next general election (A 3, 4, 9). The completed enrollment blanks were, thereupon, deposited in a locked enrollment box maintained for that purpose. Each petitioner was informed that his or her

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[4] Petitioner, Pedro J. Rosario, is 18 years old. He registered to vote for the first time on December 3, 1971 in Kings County, New York, and completed an enrollment blank designating his affiliation with the Democratic Party. He was not permitted to vote in the Democratic Primary held in New York on June 20, 1972 (A 3).

Petitioner, William J. Freedman, is 21 years old. He registered to vote for the first time on December 3, 1971, in Queens County, New York, and completed an enrollment blank designating his affiliation with the Democratic Party. He was not permitted to vote in the Democratic Primary held in New York on June 20, 1972 (A 3).

Petitioner, Karen Lee Gottesman, is 21 years old. She registered to vote for the first time on December 3, 1971, in Queens County, New York, and completed an enrollment blank designating her affiliation with the Democratic Party. She was not permitted to vote in the Democratic Primary held in New York on June 20, 1972 (A 4).

Petitioner, Steven Eisner, is 22 years old. He registered to vote for the first time on December 13, 1971, in Nassau County, New York, and completed an enrollment blank designating his affiliation with the Democratic Party. He was not permitted to vote in the Democratic Primary held in New York on June 20, 1972 (A 7-9).

attempted enrollment in the Democratic Party would be deferred, pursuant to Section 186 of New York's Election Law, until the next physical opening of the locked enrollment boxes, scheduled for November 14, 1972 (A 5, 9). Since petitioners' enrollment in the Democratic Party could not become effective until the physical opening of the enrollment boxes on November 14, 1972, petitioners were declared ineligible to participate in the June 20, 1972 New York State Presidential Primary (A 5, 9).[5]

Petitioners' initial challenge to the constitutionality of Section 186 met with success. On February 10, 1972, Chief Judge Jacob Mishler of the United States District Court for the Eastern District of New York declared that Section 186 unconstitutionally abridged petitioners' rights to participate in the electoral process and petitioners' freedom to associate with the political party of their choice.[6] In addition, Chief Judge Mishler found that Section 186 imposed a durational residence requirement for voting in a Presidential Primary in violation of Title 42 U.S.C. §1973(a)(a). (Chief Judge Mishler's opinion is reproduced in the Appendix at pp. 21-47.)

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[5] In order to have voted in the June 20, 1972 primary, petitioners would have to have completed their enrollment blanks on or before October 2, 1971—in time to have qualified for the November 1971 opening of the locked enrollment boxes. None of the petitioners registered to vote in the November 1971 general elections, at which the highest office at stake was County Executive.

[6] Petitioners initially sought the convocation of a statutory three judge Court. However, petitioners withdrew their request for injunctive relief and Chief Judge Mishler accepted jurisdiction as a single District Judge. Cf. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). Chief Judge Mishler's Memorandum of Decision describing the facts and circumstances surrounding petitioners' withdrawal of their request for injunctive relief is reproduced in the Appendix at pp. 49-56.

Respondents secured a stay of Chief Judge Mishler's declaratory judgment on February 22, 1972 and were granted an expedited appeal by the Second Circuit, which was argued on February 24, 1972 (A 63).

On April 7, 1972, a panel of the Second Circuit consisting of Judges Lumbard, Mansfield and Mulligan, reversed Chief Judge Mishler and ruled that Section 186 constituted a valid attempt to shield political parties from bad faith "raiding" by persons who were not truly in accord with the principles of the party in question. (The Second Circuit's opinion is reproduced in the Appendix at pp. 64-73.)

Petitioners' application for a rehearing in banc was denied on April 24, 1972, with Judges Oakes and Feinberg dissenting (A 78).

On April 26, 1972, Mr. Justice Marshall granted a temporary stay of the Second Circuit's judgment pending consideration by the full Court. On May 30, 1972, the full Court granted the petition for a writ of certiorari herein, but by a 5-4 vote declined to stay the decision of the Second Circuit pending plenary consideration on the merits (A 80).[7]

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[7] A final appeal to the New York State courts, in which voters similarly situated to the petitioners herein sought relief under the New York State Constitution, was dismissed without prejudice on June 14, 1972, in Supreme Court, New York County, despite the pleas of the Corporation Counsel of the City of New York and the New York State Democratic Party that persons situated similarly to petitioners herein be permitted to vote. *Kelly* v. *New York City Board of Elections*, Supreme Court, New York County, 72-11640. Although the June primaries have been completed and petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot. Since the problem to New York voters posed by Section 186 of New York's Election Law is "capable of repetition; yet evading review," this Court retains appellate jurisdiction

SUMMARY OF ARGUMENT

I.

New York's Refusal to Permit Petitioners to Vote in a Primary Election Unless They Enrolled in a Political Party at Least 30 Days Prior to the Last Preceding General Election Constitutes an Unlawful Abridgment of the Franchise.

A. *The Right to Vote in a Primary Election Is an Integral Part of the Right to Vote.*

It is no longer open to serious question that the right to vote in a primary election is as protected against state encroachment as is the right to vote in a general election. E.g., *Bullock* v. *Carter*, —— U.S. ——, 31 L. Ed.2d 92 (1972); *Terry* v. *Adams*, 345 U.S. 461 (1953). Therefore, New York's refusal to permit voters to participate in a primary election must be measured by the same constitutional standard which would test its refusal to permit them to vote in a general election.

B. *State Action Restrictive of the Franchise Must Advance a Compelling State Interest by the Least Drastic Means.*

This Court has ruled that state statutes which selectively distribute the franchise must advance a compelling state interest by the least drastic means in order to pass judicial scrutiny under the Equal Protection Clause. E.g., *Dunn* v. *Blumstein*, —— U.S. ——, 31 L. Ed.2d 274 (1972).

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to rule on the constitutionality of Section 186. E.g., *Dunn* v. *Blumstein*, —— U.S. ——, 31 L. Ed.2d 274, 279 n. 2; *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911).

C. *New York's Deferred Enrollment Scheme Does Not Advance a Compelling State Interest by the Least Drastic Means.*

New York claims that Section 186 is necessary to guard against bad faith raiding. However, by establishing a virtually absolute ban on party affiliation during the eight months preceding a Presidential primary, New York has chosen the most drastic means to guard against raiding.

1. New York May Not "Lock" a Voter Into an Unwanted Pre-Existing Political Affiliation.

The lower federal courts have unanimously rejected attempts to lock voters into pre-existing political affiliations. *Gordon* v. *Executive Committee of the Democratic Party of Charleston*, 335 F. Supp. 166 (D. S.C., 1971); *Pontikes* v. *Kusper*, —— F. Supp. —— (N.D. Ill., March 9, 1972); *Nagler* v. *Stiles*, —— F. Supp. —— (D. N.J., May 24, 1972). The less drastic alternatives of loyalty oaths (Section 174) and summary disenrollment (Section 332) render the blanket prohibition upon party enrollment contained in Section 186 unnecessary, and, therefore, unconstitutional.

2. New York May Not "Lock" Previously Unaffiliated Voters Out of the Parties of Their Choice.

Even if New York may constitutionally regulate the alteration of pre-existing party affiliations, it possesses no legitimate interest whatever in impeding newly registered previously unaffiliated voters from effecting their initial party affiliation. Whatever the views of the various states on regulating the alteration of pre-existing party affiliation, no state, with the exception of New York, has deemed it necessary to impose crippling restrictions upon new voters making an initial party affiliation.

II.

New York's Refusal to Permit Petitioners to Affiliate With the Democratic Party Unconstitutionally Abridges Their Right of Free Association.

New York's statutory scheme imposes a waiting period of eleven to fourteen months between petitioners' initial attempt to join the Democratic Party in December, 1971 and their final acceptance as party members sometime between November 14, 1972 and February 1, 1973. Such a waiting period unduly impinges upon petitioners' constitutional right to associate with the political party of their choice. *Williams* v. *Rhodes,* 393 U.S. 23 (1968). Certainly, New York cannot contend that it possesses an overriding societal interest in protecting political parties against previously unaffiliated new voters who seek merely to declare their initial party affiliations.

III.

Section 186 of New York's Election Law Establishes an Unconstitutional Durational Residence Requirement for Voting in a New York Primary Election.

Section 186 singles out all persons who have established a residence in New York subsequent to New York's last preceding general election and prohibits them from voting in a primary election in direct violation of *Dunn* v. *Blumstein,* —— U.S. ——, 31 L. Ed.2d 274 (1972).

IV.

Section 186 of New York's Election Law Operates as an Unconstitutional "Grandfather Clause" in Violation of the Fourteenth, Fifteenth and Twenty-Sixth Amendments.

In order to participate in the June 1972 Presidential Primary, New York's statutory scheme required petitioners to have been registered to vote in the November 1971 local elections. In effect, therefore, New York has established a "grandfather clause" which conditions full participation in the 1972 Presidential election upon past participation in 1971 local elections. Since such "grandfather clauses" inevitably fall with disproportionate force upon hitherto unregistered members of racial or ethnic minorities and persons having recently attained voting age, they violate the Fourteenth, Fifteenth, and Twenty-Sixth Amendments.

ARGUMENT

Introduction

The draftsmen of the Constitution did not foresee the development of political parties in the United States. Indeed, they viewed the rise of political parties as an evil, tending to foment strife and discord in the body politic. Hofstadter, *The Idea of a Party System* (1970); see generally, *The Federalist* #9 (Hamilton); *The Federalist* #10 (Madison).

However, contrary to the experience of many European democracies and the fears of the Founding Fathers, the

formation of political parties in the United States has not exerted a fragmenting effect upon our political life. Pluralism within parties, rather than pluralism among parties, has been a hallmark of American politics. Thus, political parties in the American tradition have not been viewed as ideological refuges for "true believers", but rather as groupings of diverse interests joined together in a coalition for the purpose of achieving shared political goals. Only under such a pragmatic view of the nature and function of a political party could men of such diverse ideologies as George Wallace and Allard Lowenstein and Pete McClosky and John Ashbrook share the same party affiliation.

Given such a non-ideological tradition in party politics, it is not surprising that inter-party mobility has been a fact of American political life. Peterson, *The Day of the Mugwump* (1961); Lipset, *Political Man: The Social Bases of Politics* (1960). The limits of permissible state interference with such inter-party mobility is what much of this case is about.

A second unforeseen impact of the political party system has been its dominance of the nominating process. In most elections, participation in the political party nominating process is a *sine qua non* to meaningful participation in the electoral process. Cf. *Terry* v. *Adams*, 345 U.S. 461 (1953). As the impetus for increased popular participation in the nominating process has grown, the traditional party caucus has been replaced by popularly elected nominating conventions and by the increasing use of direct primaries. Merriam and Overacker, *Primary Elections* (1928). Since many states, including New York, require that participants in the party nominating process be members of the political party

in question, the requirements of party membership exert a direct impact upon the ability of voters to participate in primary elections. The limits of permissible state interference with such participation in the nominating process poses the second major issue herein.

It should be noted that since the petitioners herein are all previously unaffiliated voters seeking to register and enroll in a political party for the first time, this Court need not reach the arguably more difficult issue of voters seeking to alter an established party affiliation in order to associate with a newly chosen political party. No issue of party "switching" or "cross-over voting" is present in this case.

Thus, the narrow issue posed herein is the permissible scope of state imposed restrictions upon duly qualified, previously unaffiliated voters seeking to enroll in a political party for the first time in order to participate in a Presidential primary. Given the non-ideological nature of our political party system and the critical importance of participating in the nominating process, New York's restrictions go far beyond the sphere of legitimate state regulation of the electoral process.

I.

New York's Refusal to Permit Petitioners to Vote in a Primary Election Unless They Enrolled in a Political Party at Least 30 Days Prior to the Last Preceding General Election Constitutes an Unlawful Abridgment of the Franchise.

This Court's interest in protecting the right of franchise against state abridgment is neither new, nor terribly surprising, given the core position which the franchise occupies in our democratic form of government. E.g., *Ex parte Siebold*, 100 U.S. 37 (1879); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Guinn* v. *United States*, 238 U.S. 347 (1915); *United States* v. *Mosley*, 238 U.S. 383 (1915); *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Lane* v. *Wilson*, 307 U.S. 268 (1939); *United States* v. *Classic*, 313 U.S. 299 (1941); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *United States* v. *Saylor*, 322 U.S. 385 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Baker* v. *Carr*, 369 U.S. 186 (1962); *Gray* v. *Sanders*, 372 U.S. 368 (1963); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *Evans* v. *Cornman*, 398 U.S. 419 (1970); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Socialist Workers Party* v. *Rockefeller*, 314 F. Supp. 984 (S.D.N.Y.), aff'd 400 U.S. 806 (1970); *Bullock* v. *Carter*, —— U.S. ——, 31 L. Ed.2d 92 (1972); *Dunn* v. *Blumstein*, —— U.S. ——, 31 L. Ed.2d 274 (1972).

A. *The Right to Vote in a Primary Election Is an Integral Part of the Right to Vote.*

It is no longer open to serious question that the right to vote in a primary election is as protected against state encroachment as is the right to vote in the general election. E.g., *Bullock* v. *Carter*, —— U.S. ——, 31 L. Ed.2d 92 (1972); *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *United States* v. *Classic*, 313 U.S. 299 (1941); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953); *Rice* v. *Elmore*, 165 F.2d 387 (4th Cir. 1947), cert. den. 333 U.S. 875 (1948). Our courts have consistently recognized that the right to vote may be rendered meaningless in the absence of a correlative right to participate in the nominating process by which candidates are selected. E.g., *Socialist Workers Party* v. *Rockefeller*, 314 F. Supp. 984 (S.D.N.Y.), aff'd 400 U.S. 806 (1970).

Thus, as long ago as 1944, in *Smith* v. *Allwright*, *supra*, this Court held:

> "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution." 321 U.S. at 661-662.

Therefore, New York's refusal to permit petitioners to participate in a primary election must be measured by the same constitutional standards which would test its refusal to permit them to vote in the November general elections. *Burke* v. *Terry*, 203 N.Y. 293 (1911) at 295; *Bullock* v. *Carter*, *supra*.

B. *State Action Restrictive of the Franchise Must Advance a Compelling State Interest by the Least Drastic Means.*

This Court has imposed a rigorous "Equal Protection" standard in testing the constitutionality of state statutes which restrict the franchise. In order to justify denying the vote to some of its citizens while permitting the remainder to vote, a state must demonstrate that the statute involved advances a compelling state interest by the least drastic means. E.g., *Dunn* v. *Blumstein*, —— U.S. ——, 31 L. Ed.2d 274 (1972).

Traditionally, state statutes challenged as violative of the Equal Protection Clause of the Fourteenth Amendment were sustained if they were rationally related to the advancement of a legitimate state interest. E.g., *McGowan* v. *Maryland*, 366 U.S. 420 (1961). Indeed, this standard was once applied by this Court to measure the constitutionality of state durational residence requirements for voting. *Drueding* v. *Devlin*, 234 F. Supp. 721 (D. Md. 1964), aff'd per curiam 380 U.S. 125 (1965). However, two major exceptions to the permissive "rational relationship" test have emerged in recent years. See, generally, Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969). If a statute purports to erect suspect classifications based upon such discredited criteria as race; or, if a statute is restrictive of the exercise of a "fundamental" right, this Court has employed a far more rigorous standard of review in determining its constitutionality. To pass scrutiny under the Equal Protection clause, such a statute must not merely be rationally related to the advancement of a legitimate state interest, but must also be found necessary to advance a compelling state interest by the least drastic means possible. E.g., *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

The right to vote is the assumption upon which the entire fabric of our political system is premised. Without the right to vote, freedom of speech and assembly would be relegated to meaningless anachronisms. It is not surprising, therefore, that this Court has explicitly recognized the right to vote as one of the "fundamental" rights, entitled to plenary protection against state encroachment.[8] Thus, Chief Justice Warren, writing for this Court in *Reynolds* v. *Sims*, 377 U.S. 533 (1964) stated:

> "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo* v. *Hopkins*, 118 U.S. 356, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights. 118 U.S. at 370." *Id.* at 561-62.

Having characterized the free exercise of the franchise as a fundamental right, this Court has applied the compelling state interest test to a number of state statutes restrictive of the franchise.[9]

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[8] This Court has identified at least the following as "fundamental" interests: (1) "procreation" *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); (2) "voting" e.g., *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); and (3) "travel" *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Dunn* v. *Blumstein*, *supra*.

[9] Practically speaking, there seems little difference between a compelling state interest analysis under the Equal Protection clause and the recognition of a substantive right to vote subject to the traditional "balancing" test. Cf. *NAACP* v. *Alabama*, 357 U.S.

In *Carrington* v. *Rash*, 380 U.S. 89 (1965), Mr. Justice Stewart, writing for this Court, invalidated a provision of the Texas Constitution which disabled servicemen from voting in Texas. Mr. Justice Stewart, in words appropriate to the instant case, stated:

> "We deal here with matters close to the core of our constitutional system. 'The right . . . to choose,' *United States* v. *Classic*, 313 U.S. 299, 314, that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state." 380 U.S. at 96.

In *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969), this Court invalidated a New York law which limited the franchise in School Board elections to property owners and parents. Chief Justice Warren, writing for the *Kramer* Court, stated:

> "Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." 395 U.S. at 626-627.

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449 (1958). Thus, the compelling state interest test applied to statutes restrictive of fundamental rights is similar to the analysis utilized by this Court in a First Amendment context to invalidate overbroad state statutes. E.g., *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

In *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969), this Court invalidated a Louisiana law restricting the franchise in municipal bond elections to property owners. In a per curiam opinion, the Court stated:

> "The challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote. When, as in this case, the State's sole justification for the statute is that the classification provides a 'rational basis' for limiting the franchise to those voters with a 'special interest,' the statute clearly does not meet the 'exacting standard of precision we require of statutes which selectively distribute the franchise.'" *Id.* at 706.

In *Evans* v. *Cornman*, 398 U.S. 419 (1970), this Court unanimously invalidated Maryland's refusal to permit residents at the National Institute of Health to vote in Maryland elections. Mr. Justice Marshall, writing for the Court, stated:

> ". . . 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment' [citations omitted]. Moreover, the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges [citations omitted]. And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." 398 U.S. at 422.

In *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970), this Court, applying a compelling state interest test, invalidated Arizona's attempt to restrict the franchise in general obligation bond elections to property owners. See also, *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

The spate of Supreme Court decisions applying a compelling state interest test to state statutes restrictive of the franchise culminated in *Dunn* v. *Blumstein*, —— U.S. ——, 31 L. Ed.2d 274 (1972), in which this Court invalidated Tennessee's one year and 90 day durational residence requirements. Mr. Justice Marshall, writing for the Court in *Dunn* v. *Blumstein, supra*, stated:

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *United States* v. *Robel*, 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson, supra*, 394 U.S. at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden of constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" 31 L. Ed.2d at 285.

Thus, in order to pass constitutional scrutiny, New York must demonstrate that its disenfranchisement of petitioners is *necessary* to promote a *compelling* governmental interest.

C. *New York's Deferred Enrollment Scheme Does Not Advance a Compelling State Interest by the Least Drastic Means.*

The Court below accepted New York's contention that Section 186 is "necessary" to guard against bad faith "raiding" of a political party by enrollees who do not share the principles of the party (A. 64-73).

It is highly doubtful whether the Court below applied the appropriate standard of judicial review to Section 186. Instead of finding that Section 186 advanced a compelling state interest by the least drastic means, the Court below was content merely to recite that Section 186 appeared "calculated to impinge minimally on First and Fourteenth Amendment rights" (A. 69 n. 4). Such a finding is scant solace to the tens of thousands of young voters who were barred from the 1972 June primary pursuant to Section 186. Nor is such a finding supported by an analysis of the statute. Far from acting in a "manner calculated to impinge minimally on First and Fourteenth Amendment rights," Section 186 is unnecessarily broad and imposes maximum, rather than minimum disenfranchisement.

By creating an absolute ban on party affiliation during the eight months preceding a Presidential primary, New York has chosen the most drastic means to guard against raiding. The Court below made no attempt to canvass the numerous less drastic alternatives open to New York and never even discussed the fact that Section 186 makes no

distinction between newly registered voters declaring their initial party affiliation and established members of one political party attempting to "cross over" into a new political party.

1. New York May Not "Lock" a Voter Into an Unwanted Pre-Existing Political Affiliation.

Even if one concedes that the prevention of bad-faith raiding is a compelling state interest,[10] it does not follow that the virtually absolute ban on party affiliation imposed by Section 186 during the eight months preceding a Presidential Primary or the eleven months preceding a non-Presidential Primary is the least drastic means of promoting such an interest.[11] Such an absolute ban upon party affiliation, imposed before prospective voters have knowledge of the issues or candidates which will be the subject of the primary election in question, far exceeds a state's power to regulate the electoral process. Cf. *Beare* v. *Smith*, 321 F. Supp. 1100 (S.D. Texas, 1971) at 1107.

In a series of cases, the lower Federal courts have invalidated similar restrictions, which act to lock voters into pre-existing party affiliations, as violative of the right to vote.

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[10] It should be noted that those in control of a political party often perceive any threat to their continued exercise of power as unjustified and, hence, a species of "raiding." One man's raiding may often constitute another man's reform. See generally, *Alexander* v. *Todman*, 337 F.2d 962 (3rd Cir.), *cert. den.* 380 U.S. 915 (1964).

[11] The eight-month *cordon sanitaire* erected by New York to guard the purity of its June Presidential primary ran from October 2, 1971, the last day on which petitioners' enrollment could have been effective, to June 20, 1972, the date of the primary. In non-Presidential years, the quarantine period runs from early October to the following September.

In *Gordon* v. *Executive Committee of the Democratic Party of Charleston*, 335 F. Supp. 166 (D. S.C., 1971), a unanimous three-judge court invalidated a South Carolina statute which barred an otherwise qualified voter from participating in a party primary if he had voted in the primary of another party within the past year. The Court stated:

> "No sound or compelling purpose can possibly justify 'locking' a citizen into a party and denying to him for a full year freedom to change parties. Such an arbitrary restraint upon the voter is both unreasonable and unconstitutional. Our system of government is based on the consent of the governed, and such consent is only illusory when voters are prevented by artificial restrictions for significant periods of time from changing political parties even though events or the actions of elected representatives may have convinced the voter that a change in party allegiance is warranted." 335 F. Supp. at 169.

The operation of Section 186 unconstitutionally "locks" New Yorkers into the political parties to which they belonged as of the last preceding general election and, for a period of one year, disables qualified voters from changing party allegiance to reflect changes in the political climate.

In *Pontikes* v. *Kusper*, —— F. Supp. —— (N.D. Ill., March 9, 1972), a three-judge District Court invalidated an Illinois statute which prohibited a voter from participating in a party primary if he had voted in the primary of another party within the past 23 months. The Court stated in *Pontikes*:

"[T]he statute sweeps too broadly, impeding both deceptive conduct and constitutionally protected activities. If Section 7-43(d) were not in effect, massive party switching could occur either because of the well-planned raiding of one party, or because of the massive dissatisfaction with the prevailing policies of any existing party. The state's interest upon which this statute is grounded could be characterized as 'compelling' only if the former alternative is more likely to occur than the latter, or if raiding constitutes a more important danger to constitutionally protected rights however often it occurs. There is no evidence to indicate that raiding is more likely to take place than 'honest' switches of affiliation. Forty-four states do not impose post election restraints on changing affiliation. This would indicate that raiding is not a serious threat to the multi-party system."

The *Pontikes* court recognized that to disenfranchise thousands of concededly *bona fide* voters in order to avoid the possibility of large-scale raiding was to exchange a certain evil for a potential evil which might well never occur.

Finally, in *Nagler* v. *Stiles*, —— F. Supp. —— (D. N.J., May 26, 1972), a three-judge District Court invalidated a New Jersey statute which prohibited alterations in party affiliations for a 23 month period. The Court in *Nagler* accepted the state's contention that it possessed a compelling state interest in guarding against bad faith raiding, but ruled that New Jersey was obliged to promote its interest by a less drastic means.

Thus, apart from the panel of the Second Circuit below, no court has sustained state restrictions on party affiliation

which act to prohibit an otherwise *bona fide* voter from effecting a good faith alteration of his party affiliation.[12]

Petitioners do not contend, however, that New York is powerless to enact "precise," narrowly drawn, regulations governing party affiliation. Indeed, New York has provided a series of less drastic regulatory measures to guard against "raiding" which render the absolute ban on party affiliation imposed by Section 186 unnecessary and, therefore, unconstitutional.

First, New York requires that all enrollees in a political party execute an oath that they are in general sympathy with the principles of the party in question. Election Law §174. Such a requirement prevents casual party affiliation in New York and it is an affront to the integrity of the electorate to assume, as did the Court below, that large numbers of New Yorkers are likely to falsify the required "solemn declaration" in order to cast a primary ballot in bad faith. Coupled with New York's comprehensive criminal sanctions directed at election fraud, Section 174 provides a meaningful protection of the integrity of party membership.

Second, Section 332 of the Election Law provides for a summary disenrollment process permitting a political party to purge itself of unwanted "raiders." As Chief Judge Mishler noted below:

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[12] In *Lippitt* v. *Cippollone*, —— U.S. ——, 40 U.S.L.W. 3334 (January 17, 1972), this Court summarily affirmed by a 5-4 vote the constitutionality of an Ohio statute which prohibited a person from running for office in a party primary if he voted in the primary of another party within the past four years. The state's interest in regulating candidacy, as opposed to voting, renders *Lippitt* inapplicable.

It is true that such raiding is possible. See *Matter of Zuckman* v. *Donohue,* 191 Misc. 399, 79 N.Y.S.2d 169 (Sup. Ct.), aff'd 274 A.D. 216, 80 N.Y.S.2d 698 (3rd Dept.) aff'd without opinion 298 N.Y. 627, 81 N.E.2d 371, 86 N.Y.S.2d —— (1948); *Matter of Werbel* v. *Gernstein,* 191 Misc. 275, 78 N.Y.S.2d 440 (Sup. Ct. 1948); *Matter of Newkirk,* 144 Misc. 765, 259 N.Y.S. 434 (Sup. Ct. 1931).[18] [Footnote renumbered.]

However, where a law is subject to the compelling state interest test it "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida,* 379 U.S. 184, 196, 85 S.Ct. 283, 290 (1964). Assuming, *arguendo,* that the protection of party integrity is a "permissible state policy," no showing has been made that the enrollment box system is necessary to its accomplishment.

The state has other, less drastic, means to accomplish its ends if it wishes to protect minority parties and small geographic subdivisions of major parties. Section 332 of the New York Election Law provides that the party enrollment of a voter may be challenged by any fellow party member and cancelled by a Justice of the State Supreme Court upon the determination of the Chairman of the County Committee of the

[18] Each of these cases involved the attempted takeover of a party organization by adherents of another party. In each case, they were almost successful. Nevertheless, it is to be noted that the enrollment box system was in effect throughout the period during which these cases arose, and that that system in no way prevented hundreds of determined voters from organizing prior to the last general election and changing their party enrollments so as to be able to "raid" the other party. All of these cases arose when the enrollments of the raiders were challenged by bona fide party members.

party in the county in which the challenged voter is enrolled that the voter is not in sympathy with the principles of the party.

That such procedure is highly effective, even on extremely short notice before a primary, is attested to by the results in the three state court cases cited above, *Zuckman*, *Werbel*, and *Newkirk*. Each of those cases involved challenges to the enrollment of party members. Each case involved an attempted takeover of one party by members of another. Challenges in each of the three cases were successful.

Such a proceeding, then, is sufficient to protect the permissible interests of the state. The challenge procedure may involve the expenditure of more time and effort on the part of state officials, but New York may not "deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington* v. *Rash*, *supra*, 380 U.S. at 96, 85 S.Ct. at 780 (A 36-37).[14]

Moreover, at least two additional less drastic means exist which would permit New York to promote its legitimate interests without unduly infringing upon the right to vote.

First, New York could confine the strictures of Section 186 to the only class of voters which, even arguably, poses a danger of organized, large scale, raiding—persons seeking to alter a pre-existing party enrollment.

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[14] It should be noted that Chief Judge Mishler is far from unaware of the realities of political life in New York. For many years prior to his elevation to the bench in 1961, he was a leader of the Queens County Republican Party and was its nominee for public office on several occasions.

Second, New York could confine the stricture of Section 186 to those persons whose enrollment has been challenged as suspect by the political party involved.

The utilization by New York of any or all of the "less drastic alternatives" suggested above would permit thousands of concededly *bona fide* voters to participate in the nominating process without posing any real danger of bad faith "raiding."

2. New York May Not "Lock" Previously Unaffiliated Voters Out of the Parties of Their Choice.

Even if New York may constitutionally regulate the alteration of pre-existing party affiliations, it possesses no legitimate interest whatever in placing obstacles in the path of newly registered voters, such as the petitioners herein, seeking to affiliate with a political party for the first time.

No distinction is made under Section 186 among: (a) "new voters," such as the petitioners herein, who are registering for the first time and declaring their initial party affiliation; (b) established voters, recently arrived in New York State, who are registering for the first time in New York State and who are merely continuing a pre-existing affiliation with a political party; and (c) established voters, such as the plaintiffs in *Gordon, Pontikes* and *Nagler*, who are seeking to alter a pre-existing party affiliation. All are subject to the one year quarantine on party affiliation imposed by Section 186. All are prohibited from participating in a party primary unless they declared their party affiliations 30 days prior to the last preceding general election.

It is difficult to perceive the legitimate—much less compelling—state interest served by a statute which prohibits

newly registered, previously unaffiliated voters from freely associating with the political party of their choice. Surely, previously unaffiliated young voters, registering for the first time, do not pose any meaningful danger of organized bad faith "raiding."[15] Indeed, no other state has imposed restrictions upon previously unaffiliated voters seeking to join a political party for the first time which even approach New York's in severity.

For example, Massachusetts, Illinois, New Jersey and Texas all permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice.[16]

California and Pennsylvania permit previously unaffiliated voters to declare an initial party preference up to the close of registration immediately preceding the primary. *California Election Code*, §§22, 203, 311-312 (Registration closes in California 53 days before a primary.); Purdon's *Pennsylvania Statutes Annotated*, Title 25, §§291 *et seq.*

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[15] Each instance of alleged attempted party raiding in New York cited by the Attorney General has involved attempts by the enrollees of one party to alter their pre-existing enrollments in order to join a new party. The instances of raiding described by the Attorney General arose out of the division of the New York American Labor Party into two wings, one of which seceded and formed the Liberal Party. The bitter struggle between the two groups for the allegiance of the constituency of the American Labor Party was the backdrop against which the alleged raiding occurred. Even in the midst of such a bitter struggle, as Chief Judge Miahler noted, Section 332 proved an effective antidote to raiding.

Counsel has been able to discover no reported instance of alleged "raiding" on the part of newly registered, previously unaffiliated, voters.

[16] See *Annotated Laws of Massachusetts*, ch. 53, §§37, 38; *Illinois Annotated Statutes* §§5-30; 7-43-45; *New Jersey Statutes Annotated*, 19:23-45; *Vernon's Annotated Texas Statutes*, Title 9, Article 13.01a.

(Registration closes in Pennsylvania 50 days before a primary).

Michigan permits any registered voter to participate in the primary of his choice. *Michigan Compiled Laws Annotated*, §§168.570, .575-.576. Even Ohio, renowned for the severity of its election laws,[17] permits previously unaffiliated voters to declare an initial party affiliation immediately before a primary. *Ohio Revised Code*, §3513.19.

Thus, whatever the views of the various states on permitting established members of one party to switch their affiliation from one party to another (Compare, *Pontikes* v. *Kusper*, —— F. Supp. —— (N.D. Ill., March 9, 1972) and *Gordon* v. *Executive Committee of Democratic Party*, 335 F. Supp. 166 (D. S.Car., 1971) with *Lippitt* v. *Cippollone, supra*), no state, with the exception of New York, has deemed it necessary to impose crippling restrictions upon newly registered voters making an initial declaration of party affiliation.[18]

Moreover, if the justification of Section 186 is the prevention of bad faith raiding, why does New York persist in applying the strictures of Section 186 to newly arrived residents of New York who are merely seeking to continue a pre-existing affiliation with the identical political party. Cf. *Jordan* v. *Meisser*, —— U.S. —— (1972). The existence of so irrational an application of Section 186 suggests that

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[17] See, e.g., *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Lippitt* v. *Cippollone*, —— U.S. ——, 40 USLW 3334 (January 17, 1972).

[18] It should, of course, be noted that a new voter's affiliation with a political party in New York, whenever it occurs, must be preceded by his signing a loyalty oath (*Election Law*, §174) and may be policed by a summary expulsion procedure (*Election Law*, §332). It is inconceivable that any legitimate need for additional protection exists.

its role as an anti-raiding statute may be little more than an ingenious *post hoc* rationalization advanced by the state to shore up an anachronistic remnant of New York's past which has long since ceased to serve any rational state interest.[19]

Thus, Section 186, by arbitrarily "locking" New Yorkers into a given party affiliation for at least one year and by unnecessarily "locking" previously unaffiliated voters out of the parties of their choice for extended periods of time ranging up to fourteen months, unconstitutionally deprives New Yorkers of their right to full participation in the electoral process. By failing to "tailor" Section 186 to guard "precisely" against bad faith raiding, New York has failed to utilize the least drastic means to promote its interests. Accordingly, Section 186 should not be permitted to stand.

II.

New York's Refusal to Permit Petitioners to Affiliate With the Democratic Party Unconstitutionally Abridges Their Right of Free Association.

New York's statutory scheme imposes a "waiting period" of from eleven to fourteen months between petitioners' initial attempt to join the Democratic Party in December 1971 and their final acceptance as party members which will

[19] Another absurd result of Section 186 is that it permits a voter who has filed an enrollment blank declaring his enrollment in a new party to continue to participate in the affairs of his old party for a substantial period of time. Thus, an enrolled Democrat who had shifted his allegiance to the Republican Party and had completed a Republican enrollment blank in December 1971 was eligible to vote in the June 1972 Democratic primary. It is possible, therefore, that Section 186 actually encourages more bad faith raiding than it prevents.

occur sometime between November 14, 1972 and February 1, 1973. Since the result of such a statutorily imposed waiting period is the abridgement of petitioners' right to vote in the June Presidential Primary, New York's statutory scheme effects an unlawful abridgement of the franchise and is, therefore, invalid. See generally, Point I, *supra*. However, even if New York's deferred enrollment procedure did not abridge petitioners' right to vote, it would, nevertheless, unquestionably violate their right to associate freely with the political parties of their choice. No state may impose onerous restrictions upon an individual's ability to associate with the political party of his choice for the advancement of political goals. E.g. *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Gibson* v. *Florida Legislative Investigations Committee*, 372 U.S. 539 (1963); *DeGregory* v. *Attorney General*, 383 U.S. 825 (1966); *United States* v. *Robel*, 389 U.S. 258 (1967); *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark., 1968), *aff'd per curiam* 393 U.S. 14 (1968).

In *Williams* v. *Rhodes, supra*, this Court recognized that the right to associate with a political party for the advancement of political goals was protected against state encroachment by the First Amendment. Mr. Justice Black, writing for the Court in *Williams* v. *Rhodes, supra*, stated:

> "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights —the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights of course,

rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States." 393 U.S. at 30-31. See also, Mr. Justice Douglas' concurrence, 393 U.S. at 35-38.[20]

In his concurring opinion in *Williams* v. *Rhodes, supra,* Mr. Justice Harlan described the role which freedom of association plays in the political process. Indeed, Mr. Justice Harlan expressly disclaimed reliance upon the equal protection analysis utilized by the Supreme Court in the *Kramer-Evans-Dunn* line of authority. Thus, he recognized that the right to join a political party, free from undue state interference, is at the very core of our associational freedoms protected by the First Amendment.

In *Carter* v. *Dies,* 321 F. Supp. 1358 (N.D. Tex., 1970), *aff'd sub nom. Bullock* v. *Carter,* —— U.S. ——, 31 L. Ed. 2d 92 (1972), this Court ruled that a Texas requirement of a substantial filing fee in order to participate in a Democratic Party Primary was unconstitutional. In his concurring opinion in the District Court, Judge Thornberry stated:

"At the very core of this dispute lies the First Amendment's guarantee of the right to engage in association

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[20] Mr. Justice Douglas, in language strikingly appropriate to this case observed in *Williams* v. *Rhodes, supra*:

"Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote." 393 U.S. at 40.

for the advancement of beliefs and ideas. . . ." 321 F. Supp. at 1363.

Thus, to the extent that New York's statutory scheme places obstacles in the path of petitioners' association with the party or parties of their choice and inhibits them from voting in the June primary, it impinges upon petitioners' First Amendment associational rights.

State statutes, such as New York's Election Law, which inhibit free association have been declared unconstitutional under two analyses. Many courts have ruled that such direct restraints on free association are absolutely invalid. E.g. *United States* v. *Robel,* 389 U.S. 258 (1967); *Boorda* v. *Subversive Activities Control Board,* 421 F.2d 1142 (D.C. Cir., 1969), cert. den. 397 U.S. 1042 (1970); *Williams* v. *Rhodes,* 393 U.S. 23, 35 (1968) (Mr. Justice Douglas concurring). Other courts have ruled that restraints on associational freedom can pass rigorous constitutional scrutiny only if they survive a stringent balancing test in which the state must demonstrate the existence of an overriding societal interest which may be advanced by no less drastic means. *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Pollard* v. *Roberts,* 283 F. Supp. 248 (E.D. Ark., 1968), *aff'd per curiam* 393 U.S. 14 (1968).

If the "absolute" analysis of *United States* v. *Robel, supra,* is applied to New York's deferred enrollment scheme, it is, of course, unconstitutional as a direct abridgement on free association.

If the "balancing" analysis of *NAACP* v. *Alabama, supra,* is applied, it is clear that New York's scheme is unconstitu-

tionally overbroad and far more Draconian than necessary. See *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

Certainly, New York cannot contend that it possesses an overriding societal interest in protecting political parties against previously unaffiliated new voters who seek merely to declare their initial party affiliation. Indeed, New York's interest in deferring petitioners' affiliation with the Democratic Party is even weaker than the state interests unsuccessfully urged by Alabama, Arkansas, Florida and New Hampshire, in *NAACP* v. *Alabama, supra; Bates* v. *Little Rock, supra; Gibson* v. *Florida, supra;* and *DeGregory* v. *New Hampshire, supra.*[21]

III.

Section 186 of New York's Election Law Establishes an Unconstitutional Durational Residence Requirement for Voting in a New York Primary Election.

In *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), this Court recognized that freedom to travel throughout the United States is one of the fundamental personal rights protected by the Constitution. See also, e.g. *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C.J.); *Edwards* v. *California*, 314 U.S. 160 (1941); *Oregon* v. *Mitchell*, 400 U.S. 112, 237 (opinion of Brennan, White and Marshall, JJ.), 285-286 (opinion of Stewart, Burger and Blackmun, JJ.).

In *Dunn* v. *Blumstein*, —— U.S. ——, 31 L. Ed. 2d 274 (1972), this Court recognized that durational residence

[21] As petitioners have demonstrated, Section 186 is certainly not the least drastic means available to guard against fraudulent enrollments. See Point I(c), *supra*, at pp. 24-34.

voting requirements directly impinged upon the right to travel by singling out newly arrived residents and denying them access to the ballot.

Section 186 of New York's Election Law singles out all persons who have established a residence in New York subsequent to New York's last preceding general election and prohibits them from voting in a primary election. Thus, all persons who established a residence in New York after October 2, 1971 (the last day to register for the November 1971 elections), were barred from voting in the June primary regardless of the duration of their pre-existing political affiliation.[22]

Chief Judge Mishler explicitly noted that Section 186 imposes a durational residence requirement for primary voting in New York. He stated:

> "It also needs little explanation that the waiting period mandated by the enrollment box system before an enrollment can become effective is a durational residency requirement. This residency requirement may vary in duration from one to eleven months, depend-

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[22] In *Jordan* v. *Meisser*, —— U.S. ——, 40 USLW 3398 (Feb. 22, 1972) this Court dismissed the appeal of a Georgia resident who had moved to New York and sought to re-establish his long time affiliation with the Democratic Party, but who was barred by Section 186. Unfortunately, in *Jordan*, the Attorney General of New York inadvertently misstated New York law by asserting that Jordan was eligible for special enrollment pursuant to Section 187 of the Election Law. Acting upon the Attorney General's incorrect representation, this Court dismissed Jordan's appeal for want of a substantial Federal question. However, during argument before the court below, the Nassau County Attorney correctly informed the court that Section 187 applies only to persons whose new residence is within the same county as his old residence. *Election Law* §187(c)(6). The Attorney General does not dispute the Nassau County Attorney's reading of the statute, which, indeed, reflects the practice followed throughout New York State.

ing on the time of year the enrollment blank is filled out and put in the box (registration and signing of enrollment blanks are closed during the thirty days before and after the general election). It is a durational residency requirement imposed in *addition* to the ninety days residence required to vote in a general election" (A 45).

The court below did not declare Section 186 unlawful as a durational residence requirement for voting because, reversing Chief Judge Mishler, it ruled that the 1970 amendments to the Voting Rights Act of 1965 (42 U.S.C. §1973a-a (1)), which invalidated durational residence requirements in Presidential elections, did not apply to primary elections.[23] However, given this Court's decision in *Dunn*, the applicability of the durational residence bar contained in the

[23] At the time Chief Judge Mishler delivered his opinion, this Court had not yet announced its decision in *Dunn* v. *Blumstein*, *supra*. Although the decision in *Dunn* has rendered Chief Judge Mishler's construction of Title 42 U.S.C. 1973a-a(1) largely academic, it seems infinitely preferable to the narrow reading of the Voting Rights Act given by the court below. It is inconceivable to assume that Congress, in enacting major legislation designed to guaranty meaningful participation in Presidential elections, did not intend to protect participation in Presidential primaries as well. Congress, no less than this Court, recognizes that participation in the nominating process is an integral aspect of voting. Congress has expressly provided that, for the purposes of the Voting Rights Act, the right to vote includes the right to participate in a primary. Title 42 U.S.C. §1973(c)(1), the definitional section of the Voting Rights Act, provides that the term "voting" "shall include all action necessary to make a vote effective in any *primary*, special or general election . . ." (Emphasis added.)

Since the provisions of Title 42 U.S.C. §1973(a)(a) speak in terms of "voting" for president and vice-president, there is no reason to suppose that Congress intended to use the phrase "voting" in other than its statutorily defined sense. Thus, "voting for president and vice-president" must mean participating not only in the general election, but in the nominating process as well.

Voting Rights Act is no longer determinative. After *Dunn*, Section 186 is unlawful, not because it imposes a durational residence requirement in violation of the Voting Rights Act, but because this Court has ruled that such durational residence requirements unconstitutionally impinge upon fundamental constitutional rights. Thus, Section 186 is in direct contravention of *Dunn* v. *Blumstein, supra.*

New York asserts that although Section 186 concededly barred all persons who established a residence in New York after the general election in November 1971 from voting in the June 1972 primaries, petitioners lack standing to urge the obvious conflict between Section 186 and *Dunn* v. *Blumstein, supra.* However, petitioners, as otherwise qualified voters who were concededly barred from voting in the June 1972 Presidential Primary solely because of the operation of Section 186, possess unquestioned standing to attack the statutes' deferred enrollment procedures and to raise all arguments demonstrating their unconstitutionality. Once a prospective voter is demonstrably injured by the operation of a statute restrictive of the franchise, he must be permitted to demonstrate that the statute's unconstitutional impact is felt across the entire spectrum of the electorate, cf. *Thornhill* v. *Alabama,* 310 U.S. 88, 98 (1940); *Flast* v. *Cohen,* 392 U.S. 83 (1968). Moreover, as representatives of the class of people affected by the presently written statute, petitioners, in this class action,[24] possess classic standing to discuss the unconstitutional impact of Section 186 upon all members of the class.

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[24] Chief Judge Mishler explicitly recognized the class action aspects of this case (A 22).

IV.

New York's Deferred Enrollment Scheme Which Conditions Full Participation in the 1972 Electoral Process Upon Past Participation in the 1971 Electoral Process Is an Unconstitutional "Grandfather Clause" in Violation of the Fourteenth, Fifteenth, and Twenty-sixth Amendments.

In order to participate in the June 1972 Presidential Primary, New York's statutory scheme required petitioners to have been registered to vote in the November 1971 local elections. In effect, therefore, New York has established a "grandfather clause" which conditions full participation in the 1972 Presidential election upon past participation in 1971 local elections. Since such "grandfather clauses" inevitably fall with disproportionate force upon hitherto unregistered members of racial or ethnic minorities and persons having recently attained voting age, they violate the Fourteenth, Fifteenth, and Twenty-Sixth Amendments.

A. *"Grandfather Clauses" and the Right to Vote.*

Grandfather clauses are, unfortunately, not unknown to the American experience. In two cases, this Court has unequivocally ruled that to the extent grandfather clauses act to inhibit full participation in the electoral process, they are unconstitutional. *Guinn* v. *United States,* 238 U.S. 347 (1915); *Lane* v. *Wilson,* 307 U.S. 268 (1939).

In *Guinn,* this Court was faced with an Oklahoma grandfather clause which confined registration without a literacy test to those persons who could demonstrate that a lineal ancestor had participated in an election prior to the Civil

War. Although the clause was non-discriminatory on its face, it obviously fell with disproportionate force upon that segment of the electorate enfranchised by the Fifteenth Amendment. Accordingly, this Court declared it unconstitutional.

In *Lane* v. *Wilson, supra,* this Court dealt with a second Oklahoma grandfather clause, passed in response to *Guinn,* which confined registration in the absence of a literacy test to those persons whose lineal ancestors either had participated in a pre-Civil War election or had registered during a grace period in 1916. It was conceded that the clause was non-discriminatory on its face and was being applied in an even-handed manner. Nevertheless, this Court, speaking through Mr. Justice Frankfurter, declared the statute unconstitutional because its effect was to frustrate the implementation of the Fifteenth Amendment. In words appropriate to this case, Mr. Justice Frankfurter stated:

> "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicapped exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." 307 U.S. at 275.

Just as the Oklahoma grandfather clauses condemned by *Guinn* v. *United States, supra,* and *Lane* v. *Wilson, supra,* inevitably fell with disproportionate effect upon the beneficiaries of the Fifteenth Amendment, so New York's grandfather clause unduly abridges the ability of the beneficiaries of the Fifteenth and Twenty-Sixth Amendments to participate in the electoral process.

See generally, *Gangemi* v. *Rosengard*, 44 N.J. 166, 207 A.2d 665 (1965); *Goetsch* v. *Philhower*, 60 N.J. Super. 582, 160 A.2d 60 (N.J. Super. 1960); *Cottingham* v. *Vogt*, 60 N.J. Super. 576, 160 A.2d 57 (N.J. Super. 1960), invalidating similar provisions of New Jersey's election laws.

B. *The Impact of New York's Statutory Scheme Upon Hitherto Unregistered Members of Racial Minorities.*

It is a stark reality that fewer than 50 percent of the qualified voters in New York, Kings and Bronx Counties participated in the 1970 general elections.

It is universally agreed that the overwhelming incidence of non-registration occurs in New York City's black and Puerto Rican ghettos. Indeed, conservative estimates indicate that over one million qualified members of racial minorities have failed to register to vote in New York City alone. Therefore, it is axiomatic that provisions conditioning full participation in the current electoral process upon some degree of past participation in past elections must inexorably bear most heavily upon the mass of black and Puerto Rican electors who have failed to participate in prior elections for reasons ranging from ignorance to despair. Instead of encouraging this mass of unregistered voters to participate in the 1972 Presidential election, New York's statutory scheme perpetuates their exclusion from the democratic process by rendering them ineligible to vote in the June primaries. Thus, to the extent that hitherto unregistered members of racial or ethnic minorities wish to involve themselves in the democratic process—perhaps because a particular Presidential candidate has captured their affections or loyalty—New York prohibits them from doing so. Such a prohibition, keyed as it is to a failure to

have registered to vote in past elections, is in clear violation of the Fifteenth Amendment. *Guinn* v. *United States, supra; Lane* v. *Wilson, supra.*

C. *The Impact of New York's Statutory Scheme on Persons Having Recently Attained Voting Age.*

The United States Census Bureau estimates that approximately 950,000 persons between the ages of 18-21 were enfranchised by the passage of the Twenty-Sixth Amendment in New York State. However, New York's statutory scheme prohibited the beneficiaries of the Twenty-Sixth Amendment who attained the age of eighteen prior to November 2, 1971, from participating in the June primary elections unless they registered to vote in the November 1971 local elections. Thus, approximately 80 percent of the beneficiaries of the Twenty-Sixth Amendment in New York State were disqualified from participating in the June Presidential Primary solely because they failed to register to vote in local 1971 elections.

The Twenty-Sixth Amendment expressly prohibits the denial *or* abridgement of the franchise on account of age. Since New York's statutory scheme virtually nullified the Twenty-Sixth Amendment as applied to the June Presidential Primary, it is clearly an abridgement of the franchise. Moreover, since the abridgement is based upon a young voter's failure to have registered for a single local election of limited interest (the only election for which he ever qualified), it is a discriminatory abridgement based upon age.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be reversed and the judgment of the United States District Court for the Eastern District should be reinstated.

Respectfully submitted,

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